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IN THE

Supreme Court of the United States

October Term, 1952

No. 484

OKLAHOMA CONTRACTING COMPANY, INC., *Petitioner,*

v.

MAGNOLIA PIPE LINE COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

An unreported memorandum opinion of the trial court filed February 14, 1950, is in the record (R. 455) along with its judgment and findings of fact filed February 20, 1950. (R. 468-474). The opinion of the Circuit Court of Appeals was filed March 22, 1952. It has been reported in 195 F. 2d 391 and is in the record. (R. 993-1002).

QUESTIONS PRESENTED

No new questions of law are involved in this case. It simply involves the construction of a contractual provision

that petitioner should have no claim of any character whatsoever for damages for delay or work stoppage due to failure of pipe supplier to deliver pipe to respondent according to the Schedule of Delivery of Pipe contained in the contract. These contracts were entered into on April 30, 1947, at a time when pipe was in sharp demand and no guarantee of delivery date would be given by the pipe supplier. Consequently, respondent had to protect itself when entering into contracts involving the laying of pipe ordered and not yet delivered.

STATEMENT

The statements of the petitioner (p. 2) are so erroneous, incomplete and inflammatory that respondent must challenge them in toto.

The facts are accurately and precisely stated by the Circuit Court of Appeals in its opinion (R. 994-997) and will not be repeated here.

Petitioner is guilty of a most flagrant and typical misrepresentation on page 2 of its petition, wherein it states in the first paragraph under the "Statement":

> "* * * and Magnolia produced no evidence that there were delays by the pipe supplier as to any of these shipping orders."

The Court's attention is invited to the testimony of W. C. Moser, Manager of Sales of the National Tube Company, in Dallas, Texas, wherein he testified that National Tube Company was not able to meet the schedule of pipe deliveries and the requisitions issued by respondent therefor (R. 322-327). Mr. True, Vice-President and Manager of the Magnolia Pipe Line Company, testified to the same effect (R. 234). Mr. Latimer, President of Magnolia Pipe Line Company, testified to the same effect (R. 310). In fact, it is undisputed in the record that there was a delay by the pipe supplier to deliver the balance of the pipe to complete the balance of Section 4, otherwise there would

have been no lawsuit for the reason that there would have been no delay. It is undisputed that the pipe was requisitioned by the Company strictly in accordance with the schedule set up for the delivery of pipe set forth in the contract (R. 222-223).

Petitioner attempts to inject into the statement of the case as a fact that pipe was diverted to Humble Pipe Line Company (pp. 7-9). This is not true and is a belated attempt to inject into this case a transaction that has no bearing whatsoever upon the questions involved in this appeal. This matter will be gone into in detail in answer to this argument of petitioner, but at this point respondent categorically denies any such false accusation and labels it exactly what it is, a figment of the imagination and a fabrication manufactured out of the whole cloth. As shown by petitioner's motion on "Newly Discovered Evidence" (R. 1029-1030), the pipe received at Houston, Texas, was Youngstown pipe, and it is undisputed in this record that every foot of Youngstown pipe, consisting of 369 miles, that Magnolia Pipe Line Company had on order was delivered to Sections 1, 2, 3, and 4 of the pipe line in accordance with the schedule, or a little ahead of the same, and in strict accordance with the requisitions issued by the Company (R. 236).

ARGUMENT

Petitioner has applied for writ of certiorari on the following four grounds:

1. Oklahoma was denied its constitutional right to a jury trial and due process of law.

2. There was fraud upon the judicial process and that such fraud was brought to the attention of the Court of Appeals, under Rule 60 (b) of the Federal Rules of Civil Procedure, and that that court should have reversed the trial court and remanded the case for the determination of the issue and for the allowance of a jury trial in a retrial of the case.

3. The pipe line industry is a great and growing industry with investments of many millions and affecting millions of users of fuel oil and gasoline, and affecting both consumers and producers of competitive fuels; the construction placed by the courts below on the contracts here involved, practically identical in terms, will have far-reaching influence; that construction of said contract is so grossly in error that it should not be permitted to stand.

4. The concern of the public is very great in the proper regulation and taxation of pipe line companies and is adversely affected by the decisions below.

The issue in the present case involves the construction of a contractual provision for release of any claim for damages in the event pipe supplier failed to deliver pipe in accordance with the tentative schedule of pipe deliveries so furnished by the pipe supplier. It involves no unique question of law and has been passed upon in countless cases from time immemorial. No amount of strained assumptions or false constructions can convert this case into one warranting review by this Court on certiorari. Respondent submits that the grounds set out as reasons for granting the writ are not well founded and that the decision below is clearly correct. The decision in nowise conflicts with any decision of another circuit court of appeals. Nor has the court below denied any question of local law in conflict with applicable local decisions, or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. We turn now to a discussion of the reasons assigned by the petitioner for granting the writ of certiorari.

(1) Petitioner Was Not Denied Any Constitutional Right to a Jury Trial and There Was No Violation of Due Process of Law.

This question of the denial of a jury in the trial court was squarely met and correctly decided by the Circuit Court in its opinion below. Since the only question involved was the construction of a plain and unambiguous contract, it would have been futile to have impaneled a jury to be instructed by the court to return a verdict for respondent.

The petitioner, in its reply brief filed in the Circuit Court of Appeals, concedes the correctness of this holding when on page 93 of its reply brief it states the following:

> "Oklahoma agrees that all rights and liabilities of appellant and of appellee are primarily governed by the construction of the clear and unambiguous contracts made and entered into by the parties on April 30, 1947."

and when on page 94 of the same brief it says:

> "We respectfully submit to this Honorable Court that, if this case had been tried before a jury, it would have been proper for the Trial Court to instruct the jury to return a verdict in favor of Oklahoma, upon a proper construction of the contracts and the uncontroverted proved damages of Oklahoma."

Respondent submits, that if it were proper for the trial court to direct a verdict in favor of petitioner, it was likewise proper for the trial court to instruct a verdict for respondent, which it in effect did when it construed the contract to release respondent from any claim for damages for delay of the pipe supplier in the delivery of pipe.

The construction of the contract involved was for the trial court. In *City of Orlando* v. *Murphy,* 84 F. 2d 531, 534, the Fifth Circuit Court stated:

> "Where the parties, as alleged in the declaration in this case, have reduced their agreement to writing,

> questions as to the construction of the contract are usually for the court. It should receive that construction which will best effectuate the intention of the parties as expressed therein. This intention must be collected from the whole agreement; and, while the court will not undertake to make contracts for the parties, where an instrument is susceptible of two meanings, it will be given a reasonable rather than an unreasonable construction, and, when possible, a contract should receive such construction as will uphold it, rather than render it nugatory. Fed. Law of Contracts, c. 13."

In the *City of Orlando* case a similar provision for release from damages was involved, and the court held that as a matter of law the same released the City of Orlando from any claim for damages.

The trial court, at the time of the trial, had already ruled upon two motions to dismiss the case and a motion for summary judgment, and in connection therewith had considered the pleadings, contracts, affidavits and depositions of the parties and arguments of counsel, all of which showed conclusively that there were no fact questions to be passed on by a jury in this case. Respondent submits that the only question involved in this case was a question of law involving the construction of the terms and provisions of a contract, and that the same was correctly construed by the courts below, and no question is raised for the review of this Court.

(2) There Was No Fraud Upon the Judicial Process in This Case.

This argument of petitioner is pure fabrication and stems from what is termed a "Motion On Newly Discovered Evidence," shown on pages 1025-1030 of the record, and what is termed "Newly Discovered Evidence Instruments," shown on pages 1031-1035 of the record. Petitioner attempts to argue from these instruments filed July 24, 1952, and August 1, 1952, while the second petition for re-

hearing was pending, that these show a diversion of pipe. On the contrary, petitioner's complaint, as shown by the opinion of the court below, was that Magnolia Pipe Line Company refused to divert pipe from other contractors.

Respondent categorically denies that it diverted any 20" pipe which it had on order with Youngstown Sheet and Tube Company and hereby states under the undisputed facts in the record in this case that it received every foot of 20" pipe that it had on order from Youngstown Sheet and Tube Company, and the same was shipped to its contractors on the 20" Corsicana, Texas-to-Patoka, Illinois pipe line. As shown by exhibit on page 923 of the record, and introduced in evidence (R. 351-352), respondent had 369 miles of Youngstown pipe on order. As shown by exhibit on pages 916-922 of the record and introduced in evidence (R. 351-353), respondent instructed its purchasing department to requisition and have delivered the full 369 miles of pipe to the contractors in accordance with the schedule set up in the contract; and as shown by requisitions actually issued by the company (R. 941-971) and introduced in evidence (R. 351-353), such pipe was so requisitioned. Under the undisputed facts the Youngstown pipe which respondent had on order was delivered to Sections 1, 2, and 3 and the balance of said pipe, to the extent of approximately 57 miles, was shipped to Section 4; that at that point the pipe that was on order from the National Tube Company was to be delivered to Section 4 in sufficient quantities to complete that section of line, but, as already shown, there was a delay in shipment by National Tube Company. The testimony of Messrs. Latimer and True set out in petitioner's brief was correct on the date that it was given, is true today, and will be true tomorrow.

The irresponsible charges made by the attorneys for petitioner are not supported by the very instruments on which they rely. The affidavit of W. P. Hughes (R. 1025) simply states that some 20" pipe stenciled "Magnolia Pipe Line Company, c/o J. E. McGeath" was shipped by Youngs-

town Sheet and Tube Company, delivered at Houston, and laid in Humble Pipe Line Company's system. A similar statement is made in the affidavit of L. T. Daugherty (R. 1032-1033).

All of the 369 miles of pipe which this respondent had on order with Youngstown Sheet and Tube Company for its Corsicana-to-Patoka pipe line was delivered to that pipe line, and there could have been no diversion. The instruments submitted to the Circuit Court were insufficient, were immaterial, and were merely cumulative evidence. New trials are never granted on merely cumulative evidence or evidence which tends merely to impeach or contradict witnesses who have testified at the trial. Assuming for the sake of argument that every statement in said affidavits is true and correct, the same would not affect the judgment either of the trial court or of the circuit court. The circuit court had before it these motions and saw that the same were insufficient and would not affect the result, and thereafter overruled the second petition for rehearing which included these motions and instruments without opinion. The decision of the lower court, denying the "Motion On Newly Discovered Evidence" and "Newly Discovered Evidence Instruments" in support of petitioner's second petition for rehearing, is eminently correct and no amount of irresponsible charges made by the petitioner in its brief can warrant review by this Court.

The case of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, cited by petitioner, is in nowise in point because extrinsic fraud was practiced upon that circuit court, and this distinction is ably stated by the court on page 245 when it says:

> " • • • This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. • • • "

Respondent denies that any perjury was committed. Petitioner attempts to say that the diversion of pipe was not

denied by the respondent. Immediately upon receipt of copies of such instruments, attorneys for respondent wrote the Clerk of the Circuit Court of Appeals for the Fifth Circuit, denied categorically any such allegations and requested of the clerk that they be advised if any reply denying such false charges was desired by the court. The clerk advised said attorneys that the matter was being referred to the Honorable Robert L. Russell, United States Circuit Judge who rendered the decision. No reply was received, but the second petition for rehearing was overruled on September 10, 1952. Your respondent realizes that this statement is outside the record as brought up, but in view of such false charges counsel believes that such statement is justified. Should any question arise concerning this statement, counsel for respondent will have the clerk make the proper certification relative thereto. Furthermore, the assertion of diversion of pipe was so false and was so apparent of record that no denial was necessary and no opportunity afforded respondent to do so. But, respondent denies such irresponsible charges in this, its first opportunity to do so.

The "Motion On Newly Discovered Evidence" (R. 1025-1030) and the "Newly Discovered Evidence Instruments" (R. 1031-1035) filed by the petitioner herein were made in support of its second petition for rehearing and were made a part of said petition for rehearing, and were duly considered by the circuit court and overruled in its order denying the second petition for rehearing, entered September 10, 1952 (R. 1030). The petitioner's false accusations have been duly considered and expressly overruled by the circuit court. The circuit court entertained jurisdiction thereof and did not ignore or refuse to pass upon it. Petitioner's complaint could only be that the circuit court refused to hold that such motions and the alleged newly discovered evidence were insufficient to affect its decision under the construction of the contract as placed thereon by that honorable court, and is not and could not be that

the court refused to consider it. The circuit court's decision in overruling the petition for rehearing that such motion and the evidence submitted in connection therewith were insufficient to affect its previous decision entered on March 22, 1952, was eminently correct, does not conflict with any decision of this court or with any other circuit courts of appeal. As was said by this Court in *Purcell* v. *Miner*, 4 Wall. 519, 521:

> "* * * He offers no new evidence, but what he might as well have produced before, and which, if it had been produced, would not have justified a decree in his favor."

(3) The Construction Placed by the Courts Below on the Contracts Here Involved Will Not Have Any Far-Reaching Influence, Is Not Grossly in Error, But on the Contrary Is Correct and Does Not Conflict With Previous Decisions Involving Similar Contractual Provisions.

The petitioner's attempt to create the impression that this decision is affected by the public interest is so far-fetched as hardly meriting an answer. Clauses similar to the ones involved in this contract are commonplace and customary and have been construed and enforced in countless cases.

In the case of *Wells Bros.* v. *United States*, 254 U. S. 83, it was held that, under a provision that no claim shall be made or allowed to contractor for any damages which may arise out of any delay caused by the United States, the contractor could not recover for any damages due to delay by reason of changing of materials.

In the case of *Wood* v. *United States*, 258 U. S. 120, where the contract provided that no claim would be made or allowed for damages which might arise out of any delay caused by the Government, damages due to delay caused by the Government's suspension of the work could not be recovered even though such suspensions were not expressly authorized by the contract.

The case of *H. E. Crook Company, Inc.* v. *United States*, 270 U. S. 4, involved a contract for furnishing and instal-

ling heating plants in buildings to be erected for the Government by other contractors and which contract showed on its face that progress under it would be dependent upon the progress of the buildings. The contract made no references to delays by the Government save as grounds for time extensions to the contract. It was there held that the Government was not bound to make good losses suffered by the contractor in performing the contract due to delays in completing the buildings.

In the case of *United States* v. *Rice*, 317 U. S. 61, it was held that, under a Government contract for the installation of equipment in buildings, and under which the contractor agreed to complete the work within the time allowed under another contract with another contractor for the construction of buildings, and wherein it was provided in the other contract that changes could be made therein, the delay caused contractor in the installation of equipment by reason of change of the plans in the main contract did not allow recovery by said contractor.

In *United States* v. *Howard P. Foley Co., Inc.*, 329 U. S. 64, where the construction contract provided for the installation of the runways of an airport, it was held that the Government was not liable for damages for delay in making the runways available to the contractor, though the delay prevented completion within the specified time, since the contract did not obligate the Government, expressly or impliedly, to make the runways available promptly, and the contract contained provisions anticipating delays caused by the Government, and the Court further held that the fact that no other contractor was involved did not require a result different from that reached in *Crook Co.* v. *United States*, supra, and *United States* v. *Rice*, supra.

The argument of petitioner that the construction placed upon the contracts here involved will result in pipe line contractors adding millions of dollars to their contract prices and thereby increasing the costs to consumers of products transported by pipe line is utterly ridiculous. On

the contrary, if the decision were made that a party cannot expressly relieve himself from any liability for delay caused by reason of the supplier of the material failing to deliver the material, and therefore would have to pay for all such delays, this would materially increase the cost of the facilities used by the pipe line companies. The express provision releasing the respondent from liability was in the contract and specifications at the time petitioner submitted bids, and the words of Justice Clarke, in *Wells Bros* v. *United States*, supra, are very much in point:

> "Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work."

Thus it is submitted that petitioner's attempt to inject public interest in this case is absurd.

(4) The Concern of the Public in the Proper Regulation and Taxation of Pipe Line Companies Is Not Adversely Affected by the Decisions Below.

The concern of the public may be very great in the proper regulation and taxation of the pipe line companies, but respondent can hardly see the materiality of this statement to this lawsuit. How the decision below could affect regulation of pipe lines or the taxation of pipe lines is beyond the understanding of respondent. The argument is made by petitioner in its petition that a million dollars should be paid to petitioner, as:

> " • • • This excess cost should be paid by Magnolia to Oklahoma and not go into the rate base of Magnolia for rate making purposes; should not be made available to Magnolia to capitalize in its costs for depreciation in its corporate tax returns; and should not be

> used in order to enable Magnolia to pay increased dividends to its stockholders in 1947 by completing the line to Conway and placing it in use."

Such a fallacious statement is utterly ridiculous and ludicrous, and would be a greater trick than any ever performed by Houdini during his lifetime. Respondent submits that such a line of argument adequately demonstrates the many immaterial, irrelevant issues that the petitioner has attempted to inject into this lawsuit, both in the trial and appellate courts, and petitioner should be compelled to follow the rules laid down for the trial and appeal of cases. Respondent submits that this petitioner has more than had its day in court.

In chronological order, the controversies here involved resulted in this sequence of litigation:

1. Oklahoma filed proceedings on September 1, 1949, in a district court of Dallas County, Texas, to perpetuate the testimony of L. H. True and George T. Jackson, employees of Magnolia (R. 69-72). Under Texas law this proceeding to perpetuate testimony is not of itself an independent suit, *Lambert* v. *Texas Employers Insurance Assn.* (Civ. App.), 121 S.W. 2d 406.

2. Magnolia, a Texas corporation, sued Oklahoma, a Delaware corporation, in the United States District Court for the Northern District of Texas at Dallas on September 19, 1949, on two counts, one under 28 *U.S.C.A.* § 1332 (R. 51), wherein Magnolia sought judgment against Oklahoma for $268,274.50 (R. 61, 205, 494), and a second separate count under 28 *U.S.C.A.* § 2201 (R. 51), seeking a declaratory judgment of all rights and liabilities between the parties (R. 50, 62).

3. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 4 watering down pipe, alleged failure to deliver pipe, retainage, and exemplary damages (R. 73-85).

4. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 1 watering down pipe (R. 86-90).

5. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 5 alleged failure to deliver pipe, discriminations in favor of other contractors on cost-plus basis, retainage, and exemplary damages (R. 91-102).

6. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 6 alleged failure to deliver pipe, retainage, and exemplary damages (R. 102-112).

7. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering Section 7, or the Red River crossing (R. 113-115).

In chronological order, the proceedings in the trial court took this sequence:

1. Original petition filed September 19, 1949 (R. 50).

2. Oklahoma's first motion to dismiss, "Addressed to the Discretion of the Court," filed October 10, 1949 (R. 63).

3. Order entered November 1, 1949, overruling first motion to dismiss (R. 116).

4. Second motion to dismiss of Oklahoma, "Addressed to the Discretion of the Court," filed November 14, 1949 (R. 117).

5. Original answer of Oklahoma, filed November 14, 1949 (R. 487).

6. Magnolia's motion for summary judgment, filed November 23, 1949 (R. 492).

7. Motion of Magnolia to strike second motion to dismiss, filed November 23, 1949 (R. 532).

8. Defendant's demand for jury, filed November 28, 1949 (R. 157).

9. Physical tender on November 29, 1949, by Magnolia of net retainage, amounting to $22,229.95, into the registry of the court (R. 543).

10. Amended answer and counterclaim of defendant, Oklahoma Contracting Company, Inc., filed December 2, 1949 (R. 162).

11. Reply of plaintiff, Magnolia Pipe Line Company, to answer and cross-action of Oklahoma, filed December 5, 1949 (R. 198).

12. Hearing on Magnolia's motion for summary judgment on December 5, 1949 (R. 558).

13. Order entered December 7, 1949, overruling amended motion to dismiss of Oklahoma, overruling motion to strike of Magnolia, overruling motion for summary judgment of Magnolia without prejudice to trial on the merits, and ordering the case to be tried as a nonjury case (R. 159).

14. The cause below was tried on the merits February 13-14, 1950 (R. Vol. I-iii, 206).

15. On February 14, 1950, Magnolia and Oklahoma entered into a written stipulation covering the total retainage of $60,857.92 and the net retainage of $22,229.95 then in the registry of the court (R. 908).

16. During the course of the trial, the Red River crossing claim was the subject of a stipulation (R. 469, 247), it appearing that this controversy had long previously been disposed of by written settlement between the parties (R. 576, 641-643).

17. The court below rendered an oral opinion on February 14, 1950 (R. 455).

18. The trial court made findings of fact and conclusions of law on February 20, 1950 (R. 468).

19. The trial court entered final judgment on February 20, 1950 (R. 471).

In chronological order, the proceedings in the circuit court of appeals took this sequence:

1. Upon appeal the case was submitted on oral argument on December 13, 1951, almost two years after the date of trial (R. 992).

2. Appellant had filed a brief and a reply brief.

3. The circuit court rendered its opinion on March 22, 1952 (R. 993-1002).

4. The circuit court rendered its formal judgment on March 22, 1952 (R. 1003).

5. Petitioner secured extension of time to file petition for rehearing, to May 12, 1952, by order dated April 7, 1952 (R. 1003).

6. The time for filing a petition for rehearing was further extended to May 22, 1952, by order dated May 6, 1952 (R. 1004), upon request of petitioner.

7. The petition for rehearing was filed on May 22, 1952 (R. 1005-1011).

8. A supplemental petition for rehearing was filed by petitioner on May 28, 1952 (R. 1013-1016).

9. In connection with this petition for rehearing and supplemental petition, petitioner filed a brief in support of its petition for rehearing, a supplemental brief in support of petition for rehearing, and a second supplemental brief of authorities and argument in support of its petition for rehearing.

10. The petition for rehearing was overruled by the circuit court on June 18, 1952 (R. 1017).

11. A second petition for rehearing was filed by petitioner in the circuit court on July 3, 1952 (R. 1019-1024); a brief in support of said second petition for rehearing was attached thereto.

12. Petitioner filed a "Motion On Newly Discovered Evidence" in support of its petition for rehearing in the circuit court on July 24, 1952 (R. 1025-1030).

13. Petitioner filed "Newly Discovered Evidence Instruments" in the circuit court on August 1, 1952 (R. 1031-1035).

14. Petitioner then filed in the circuit court "Appellant's Supplemental Brief In Support of Its Second Petition for Rehearing" and another brief labeled "Appellant-Petitioner's Supplemental Brief In Support of Its Petitions for Rehearing."

15. The second petition for rehearing, including the motions on newly discovered evidence and instruments filed in support of said second petition for rehearing, was overruled by the circuit court on September 10, 1952 (R. 1030).

Respondent has tried to meet fairly and honestly all side issues injected into this case haphazardly by the petitioner at all stages of the trial and appeal, and this Court should put an end to this case by a denial of the writ of certiorari.

CONCLUSION

WHEREFORE IT IS RESPECTFULLY SUBMITTED that the decision below is correct; there is no conflict in the decisions; no other reasons appear which would warrant further review; the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1952

No. 484

Oklahoma Contracting Company, Inc., *Petitioner,*

vs.

Magnolia Pipe Line Company, *Respondent.*

PETITIONER'S REPLY BRIEF

Preliminary Statement

Counsel for Oklahoma[1] categorically deny the correctness of the statements by Magnolia's counsel that "the only question involved was the construction of a plain and unambiguous contract" and that "it would have been futile to have impaneled a jury to be instructed by the court to return a verdict for respondent." (P. 5).

It is an indisputable fact that the judgment entered below in this litigation was adverse to Magnolia and in favor of Oklahoma on each and every alleged cause of action stated in Magnolia's complaint seeking a monetary judgment against Oklahoma. The only monetary judgment entered below was against Magnolia and in favor of Oklahoma on one of the causes of action alleged in the latter's cross-complaint, or counterclaim filed by Oklahoma. The trial court entered judgment against Okla-

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[1] As in the petition, the petitioner will be referred to herein as "Oklahoma" and the respondent as "Magnolia."

homa denying other causes of action set forth in the cross-complaint and against Magnolia on its claim against Oklahoma. Thus in no event would a jury have been instructed by the court *"to return a verdict for respondent"*, as stated by its counsel. (R. 468-474).

The other statement by Magnolia's counsel is equally in error that the "only question involved was the construction of a plain and unambiguous contract".

Obviously, no exculpatory stipulation in a contract may be construed in vacuo; such contract stipulations are for the sole and only purpose of determining the rights and obligations of the parties thereto on the basis of facts as they develop from time to time during the course of performance of the contracts. Such exculpatory provisions in contracts constitute a yardstick, as it were, for measurement purposes; they definitely are not the thing measured, in this case the facts of delay and stoppage of work as alleged in the amended answer and counterclaims filed by Oklahoma (R. 162-197). Under the Federal system, and in view of the Sixth and Fifth Amendments to the Constitution, due process of law requires, that the triers of fact shall be the jury, when demanded, and not the judge in a law action where the amount involved exceeds $20.00. This is horn-book law, specifically stated in the Sixth Amendment and declared in numerous decisions of both this Court and the Courts of Appeal. Some of these cases are cited in the petition (pp. 21-22).

Here the trial judge denied the written demand, seasonably made, of Oklahoma for a jury trial. The Judge, himself, proceeded to, and did, determine the facts. (R. 468-470).

The crux of this case lies in the facts, not in the exculpatory stipulation in the contracts. The case is here because the trial judge denied Oklahoma a jury trial and that judge erroneously determined the facts, in important instances sharply disputed between the parties.

ARGUMENT

I.

Magnolia Failed and Refused To Meet the Exculpatory Terms of the Contracts. Hence Such Exculpatory Terms of the Contracts Do Not Absolve Magnolia from Liability To Oklahoma for the Excess Costs Sustained by Oklahoma by Reason of Such Failure and Refusal of Magnolia. Oklahoma's Right To a Jury Trial Was Absolute.

Oklahoma strenuously insists, and the record evidence supports such insistence, that Magnolia failed and refused to furnish pipe "as needed" by Oklahoma for the construction of parts of this pipe line, NOT BECAUSE MAGNOLIA HAD NOT RECEIVED DELIVERY OF THE PIPE FROM ITS SUPPLIER but because Magnolia diverted 40 miles of the needed pipe, delivered to it by one of its two suppliers, to another pipe line company and because Magnolia improperly apportioned pipe delivered by its pipe suppliers, among the several sections of the pipe line—both to serve ends and objects of Magnolia wholly foreign, and without due regard, to its contract obligations to Oklahoma to furnish pipe as needed by Oklahoma.

The facts in this respect are certainly for determination in a Federal court by a jury—and not by a judge unless there be mutual consent thereto.

The exculpatory terms of the contracts have not been quoted by Magnolia's counsel in their brief but the same are quoted on page 4 of the petition and the applicable terms of the specifications are quoted on pages 4 to 6 inclusive of said petition. These provisions of both the contracts and specifications will be found in the record on the pages cited in the petition.

These exculpatory terms of the contracts do not come into operation to excuse Magnolia from causing delay or work stoppage unless:

> "• • • DUE TO FAILURE OF PIPE SUPPLIER TO DELIVER PIPE TO COMPANY ACCORDING TO PRESENT SCHEDULE OF DELIVERY OR IF COMPANY IS UNABLE TO FURNISH THE MATERIAL AS NEEDED FOR ANY OTHER REASON BEYOND ITS CONTROL."

Oklahoma asserts, without fear of successful contradiction, that the delay and work stoppage caused it were the result of Magnolia diverting 40 miles of the same size and kind of pipe to the Humble Pipe Line Company and also because Magnolia delivered pipe largely in excess of current needs of the contractors on Sections 2 and 3 of the pipe line, so as to insure its completion before December 31, 1947, for its own convenience and purposes, without the knowledge or consent of Oklahoma, and did not allocate or furnish a part of this pipe to Oklahoma as said company needed it on Sections 4, 5 and 6 of the pipe line.

The receipt can not be denied by Magnolia of 40 miles of this pipe shipped to it in care of Mayes Bros. Houston, Texas, and diverted, sold, or loaned by Magnolia to the Humble Pipe Line Company in August and September 1947, at the identical time Magnolia's representatives testified they had done everything possible to locate pipe for the continuation of work on this pipe line. The newly discovered evidence, in the form of affidavits and shipping documents, which are here (R. 1029-1030, 1032-1034B), admits of no successful denial.

Not having produced such documents and explanations in the trial, in response to the demand of counsel for Oklahoma for all of the pipe delivery orders and shipping records, and their existence having been later discovered by Oklahoma, counsel for Magnolia now state that after

they received notice of copies of such documents having been filed in the Court of Appeals below, they wrote a letter to the clerk of that court wherein they categorically denied the same and requested advice as to whether the said Court wanted a reply denying "such false charges"; that the clerk advised Magnolia's counsel the letter was being referred to Judge Russell of that court; and that said counsel received no further reply (P. 9).

This is the first information counsel for Oklahoma has received that even such a letter was written to the clerk as now claimed by counsel for Magnolia. No copy of such letter was sent to Oklahoma's counsel. Certainly no copy of a formal reply, in accordance with rules of court procedure, was received by counsel for Oklahoma. Counsel for Magnolia are most able and experienced lawyers. They knew how to answer such a motion as that filed by counsel for Oklahoma in the Court of Appeals, supported by the affidavits and documents now here showing the existence of the newly discovered and most material evidence.

We understand that Counsel for Magnolia now deny on the record (Brief, p. 9) that there was any delivery of pipe consigned by the Youngstown Sheet and Tube Company to Magnolia Pipe Line Company c/o Mayes Bros., Houston, Texas, which had stenciled on it "Magnolia Pipe Line Company, c/o J. E. McGeath" (R. 1029), or that said pipe was redelivered to, or laid in the Humble Pipe Line Company's pipeline in August and September 1947.

This denial in itself, constitutes a jury issue, as well as do all of the facts and circumstances connected therewith.

Magnolia's counsel know full well that they did not produce this record of the concealed transaction concerning the purchase of the 40 miles of pipe and its subse-

quent delivery by Magnolia, or release by Magnolia to the Humble Pipe Line Company. As is stated in the petition, and repeated here for emphasis, counsel for Oklahoma did not know of the existence of these documents or transactions until shortly before the motion and the supporting affidavits and documents, were presented to the Court of Appeals. We do not understand why under such circumstances counsel for Magnolia have seen fit to cite to this court the case of *Purcell* v. *Miner*, 4 Wall. 519.521, (p. 10) in this connection with no attempt whatever to distinguish the cases in this Court and elsewhere, cited in the petition, unless it be a studied effort on their part to minimize the importance thereof. If so, it should certainly fail.

The Court will note that these counsel for Magnolia have seen fit in their brief to completely ignore that part of the petition insisting that Magnolia had failed to furnish pipe as needed by Oklahoma on Sections 4, 5 and 6 of the line because Magnolia delivered to the contractors on Sections 2 and 3 of the line sufficient pipe to completely construct each of the two sections notwithstanding the contractors would not need the same for literally months after it was delivered and at a time when Oklahoma could not lay a single foot of pipe because Magnolia had furnished the pipe, delivered by the pipe suppliers, to Sections 2 and 3 of the pipe line largely in excess of any current or immediate needs of the contractors at work on said sections.

This Court will note that counsel for Magnolia make no attempt in their brief to deny that the reason Magnolia delivered pipe to sections 2 and 3 of the pipe line, as it was delivered to Magnolia by the pipe suppliers, was because Magnolia decided after the construction of the line had commenced to complete that part of the pipe line from Corsicana, Texas, to Conway, Arkansas, (this being Section 1 completed August 15, 1947, by Oklahoma

and Sections 2 and 3 being constructed by other contractors) so that Magnolia's stockholders could receive a larger dividend for 1947, based on the completion and use of these three sections of pipe line.

The characterization of such a statement in the petition—based on record evidence (R. 229, 691-692)—as "a fallacious statement is utterly ridiculous and ludicrous and would be a greater trick than ever performed by Houdini during his lifetime",[2] is not an argument at all. If the Court believes that such language on the part of members of its Bar is improper, the Court will know how to deal with the offenders.

In any event, the issue is for a jury to determine whether the pipe deliveries by the pipe supplier to Magnolia were in good faith delivered by Magnolia to sections 2 and 3 of the pipe line, largely, and for months, in excess of the current needs of such contractors, while by reason thereof Oklahoma had to stop work on Sections 4, 5 and 6 for failure of Magnolia to furnish pipe as needed by Oklahoma for continuation of construction.

If the case had been submitted to a jury, and if the jury had determined that the 40 miles of pipe had been sold, conveyed, loaned, or otherwise delivered by Magnolia in August and September 1947 to the Humble Pipe Line Company, or if the jury had determined that the delivery of pipe on Sections 2 and 3, largely in excess of the needs of the contractors on said Sections for months in advance, was not in good faith, but for the purpose of securing increased dividends for the stockholders of Magnolia, then it may be assumed that no legal mind could argue that Magnolia would receive exculpation for the resulting delays under paragraph 4 of the contracts and the applicable terms of the specifications quoted in the petition. (Pp. 4-6).

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[2] In the same category is their statement on page 2 of their brief (Infra, p. 18).

We think there is now in the record ample evidence, from which a jury could have properly found and determined: (1) That the delays and work stoppage by Oklahoma were not beyond the control of Magnolia, that is, not within the exculpatory terms of the contracts, when instead of delivering the 40 miles of the identical pipe needed by Oklahoma to continue construction operations,[3] Magnolia permitted the same to be obtained from it by the Humble Pipe Line Company for use in its pipe line; and (2) That, similarly, Magnolia acted in bad faith in causing Oklahoma to delay and finally stop its work for lack of pipe, while sufficient pipe to permit such continuance of the work by Oklahoma had been delivered by Magnolia to Sections 2 and 3 of the pipe line largely in excess of the current or reasonably current needs of the contractors on the said respective sections, and, as hereinafter shown (Infra, pp. 12-13), was not used for literally months after the same had been so delivered by Magnolia. It was, and is, the exclusive function of a jury to determine whether that action on the part of Magnolia was stupid, arbitrary, or motivated by greed of the management of Magnolia to obtain increased dividends for the stockholders by placing this line in operation to Conway, Arkansas, before December 31, 1947.

The denial of a written demand for a jury trial in such an instance is both arbitrary and capricious and constitutes a denial of due process of law and the denial of a jury trial in violation of both the Fifth and Sixth Amendments to the Constitution of the United States.

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[3] Whether this 40 miles of pipe was a part of, or in addition to the 369 miles of pipe ordered by Magnolia to be manufactured by Youngstown (R. 923) is wholly immaterial. That pipe was delivered to Magnolia when Oklahoma needed pipe. (R. 310).

II

It Is Wholly Beside the Point for Magnolia's Counsel To State in Their Brief that Oklahoma "Should Have No Claim for Damages for Delays or Work Stoppage Due To Failure of Supplier To Deliver Pipe To Respondent According To Schedule of Delivery Contained in the Contract" (p. 2).

In the first place, this is not one of the issues in this case. In the second place it is not now claimed, and has never been claimed, that, under the exculpatory terms of these contracts, Magnolia was liable in damages for any failure of Magnolia to furnish pipe when needed by Oklahoma IF SUCH FAILURE TO FURNISH NEEDED PIPE WAS DUE TO THE FAILURE OF MAGNOLIA TO RECEIVE DELIVERIES FROM ITS PIPE SUPPLIERS IN EVENT THE SHIPPING ORDERS WERE SEASONABLY GIVEN BY MAGNOLIA FOR THE PIPE. This is a very dead "Red Herring" which counsel for Magnolia has dragged into this case, which served to confuse the lower courts as to the issues, and which Magnolia's counsel apparently hope to use here for the same purpose! If there had been a jury trial, we are quite certain that this effort would have been wholly unsuccessful in the first instance.

Oklahoma insisted in the trial court and in the Court of Appeals that the delays and work stoppages of said company resulted because:

MAGNOLIA USED A VERY LARGE QUANTITY OF PIPE DELIVERED BY THE PIPE SUPPLIERS TO MAGNOLIA IN THE EARLIER STAGES OF THE CONSTRUCTION OF THIS PIPE LINE TO EXTEND FROM CORSICANA, TEXAS, TO PATOKA, ILLINOIS, A DISTANCE OF 650 MILES, TO DELIVER PIPE TO SECTIONS 2 AND 3 OF THE PIPE LINE, LARGELY IN EXCESS OF ANY CURRENT OR REASONABLY IMMEDIATE NEEDS OF THE CONTRAC-

TORS WORKING ON SAID SECTIONS 2 AND 3: THAT SUCH PIPE DELIVERED TO SECTIONS 2 AND 3 WAS SUFFICIENT TO COMPLETE THE CONSTRUCTION OF SAID SECTIONS; THAT SECTIONS 2 AND 3 WERE NOT COMPLETED UNTIL NEAR THE MIDDLE OF DECEMBER 1947; THAT FOR MONTHS PIPE IN EXCESS OF THE NEEDS OF THE CONTRACTORS ON SAID SECTIONS 2 AND 3 WAS NOT USED OR NEEDED BY SAID CONTRACTORS; AND THAT MAGNOLIA REFUSED TO FURNISH, OR CAUSE TO BE FURNISHED, ANY OF THE UNUSED AND UNNEEDED PIPE ON SECTIONS 2 AND 3 TO MEET THE NEEDS OF OKLAHOMA ON SECTIONS 4, 5 AND 6 OF THE PIPE LINE, WITHOUT WHICH OKLAHOMA'S WORK HAD TO STOP.

In other words, Oklahoma asserted, in effect, that the delay and work stoppage encountered by it for lack of needed pipe were not due to any failure of the pipe suppliers of Magnolia to deliver pipe to it, but was due to maladministration by Magnolia in not distributing the pipe delivered to it by its pipe suppliers to the several sections of the pipe line as pipe was needed by the respective contractors to enable them to complete their work, or get as much of it completed as possible, before the wet, freezing, and muddy weather, along the construction route, was due to appear in the winter of 1947-1948 and spring of 1948. Also, Oklahoma insisted that the action in this respect by Magnolia in delivering all of the pipe to Sections 2 and 3, sufficient to complete said sections (Section 1 having been previously constructed), was the concealed purpose and intent of the management of Magnolia to get into operation by December 31, 1947, the segment of the pipe line from Corsicana, Texas, to Conway, Arkansas, so that it could be placed in operation —delivering to tank cars at Conway—and dividends paid to the stockholders for 1947, based on the value of such operating segment under a certain consent decree referred to in the petition (pp. 9-10).

A further failure of Magnolia to deliver to Oklahoma as needed pipe it had received from its pipe supplier was discovered by Oklahoma after the case had been tried and after the Court of Appeals had filed its opinion affirming the trial court but while a motion for rehearing was pending in the Court of Appeals. This new evidence was promptly brought to the attention of the Court of Appeals, as a supplement to the pending motion for rehearing, and is the evidence as to the concealment and diversion of the 40 miles of identical pipe in August and September 1947 which is now before this Court (R. 1029-1030, 1032-1034B) and emphatically denied in the brief for Magnolia.

This transaction between Magnolia and the Humble Pipe Line Company could, and would have been explored and the evidence placed before the trial court at the time of the trial had Magnolia's counsel furnished, in response to the demand of Oklahoma's counsel, all of the papers concerning the contracts, orders for delivery, and shipments of pipe for this pipe line or any pipe suitable for this pipe line.

Regardless of any discourteous statements by Magnolia's counsel, we do not intend to be diverted in placing the issues of this case squarely before this Court.

Under the terms of the contracts and specifications, quoted in the petition (Pp. 4-5), Magnolia was to furnish the pipe as "needed" by the contractors for construction of the line or their respective sections thereof. Where, or how, or from whom Magnolia purchased, or otherwise obtained, the pipe was of no concern to Oklahoma. The contracts with Oklahoma made no reference to the amounts of pipe to be delivered by the pipe suppliers or their identity.

It was the legal responsibility of Magnolia to furnish to the contractors as they "needed" the same for construction purposes the pipe as delivered by the suppliers to Magnolia. Under paragraph 4 of the contract

(Petition, p. 4) Magnolia was not to be responsible in damages to any contractor when the pipe was not furnished by Magnolia due to failure of the pipe supplier to deliver the pipe to Magnolia or "for any other reason beyond its control." Magnolia had no right to responsibility to deliver pipe largely in excess of the needs of the contractors, to the extent of 100 miles or more (R. 873-886, 242-244), at a time when another contractor on the pipe line was in need of pipe to continue operations. But that is what Magnolia did do!

Obviously, there was no failure of the pipe supplier to deliver the 40 miles of pipe to Magnolia which it permitted the Humble Pipe Line Company to secure; that is, which Magnolia in turn delivered to Humble.

It is equally obvious that there was no failure of the pipe supplier to deliver the pipe which Magnolia saw fit to deliver sufficient to complete Sections 2 and 3 of the pipe line, to give Magnolia a segment of line from Corsicana to Conway, to be placed in operation before December 31, 1947,—quantities of pipe so largely in excess of any current needs of the contractors on said sections from June or July 1947 that it was not all installed until about the middle of December 31, 1947, and which one of the contractors would not have had installed by that date if a part of this section had not been let to another contractor to assist in completing the same!

Specifically, what actually happened in the furnishing of pipe by Magnolia was ignored in the trial court's findings of fact (R. 468-470) but is established by the record: Magnolia, by July 27, 1947, had completely delivered the 107.5 miles of pipe for Section 2 (R. 874); in fact, all but 15.75 miles of this pipe had been delivered during the interim between May 25, 1947 and July 19, 1947 (R. 873). Yet, this contractor for Section 2 DID NOT COMPLETE THE INSTALLATION OF THE ENTIRE SECTION 2 OF 107.5 MILES UNTIL DECEMBER 12, 1947 (R. 878). Thus for much of the entire period—from

about May 25, 1947 to shortly before December 12, 1947 —there was on Section 2 of the pipe line amounts of pipe largely in excess of any current or immediate need of that contractor.

Also, Magnolia delivered all of the pipe for Section 3 of the line, 113 miles in length, by July 22, 1947 (R. 880); in fact, all but 14 miles of this pipe had been delivered by Magnolia by July 16, 1947 (R. 879). Yet this contractor DID NOT COMPLETE THE INSTALLATION FOR THE ENTIRE SECTION 3 OF 113 MILES UNTIL DECEMBER 13, 1947 (R. 886) AND THIS WAS MADE POSSIBLE ONLY BY THE FACT THAT ANOTHER CONTRACTOR WAS BROUGHT IN BY MAGNOLIA TO ASSIST IN THE COMPLETION (R. 847-851, 386-387, Footnote 2, petition, p. 11). Thus, for much of the period from July 16th to December 13th there was on this Section 3 of the pipe line quantities of pipe largely in excess of the current or immediate needs of the contractor for installation.

During these long periods, while pipe so largely in excess of any needs of the contractors for Sections 2 and 3 of the pipe line had been furnished by Magnolia, and not only was unused, but was not used for months later, Oklahoma was delayed and finally had to stop work for lack of needed pipe. While some of the pipe had been delivered to Section 4 by August 15th, or approximately the time the diversion of the 40 miles of pipe to Humble commenced, the balance of 16 miles of pipe to complete Section 4 was not delivered until October 15, 1947 (R. 887-891). Certainly there was enough pipe in excess of the needs of the contractors on Section 2 and 3 of the pipe line to have provided 16 miles of pipe to permit of the completion of Section 4 of the pipe line. A part of the 40 miles of pipe which went to Humble could have been used to complete this section.

Magnolia's evidence shows that no pipe whatever was furnished by it for use on Section 5 of the line, consisting

of some 118.25 miles, until October 27, 1947 and by November 20, 1947, but a total of 50.85 miles of pipe had been furnished for this section (R. 893). The balance of the pipe for Section 5 was not furnished until January 5, 1948 to March 14, 1948 (R. 895). Certainly if Magnolia had furnished Oklahoma in August and September 1947, the 40 miles of pipe which was delivered by Youngstown Sheet & Tube Company to Magnolia, that pipe plus what was furnished in October and November 1947 would have just about completed Section 5 and the small balance could have been obtained from the pipe furnished in excess of current needs on Sections 2 and 3 of the pipe line.

This same Magnolia evidence, produced upon demand of Oklahoma's counsel (R. 661-663, 351-353), shows that no pipe whatever was furnished by Magnolia for Section 6, which was 124.4 miles in length, until December 1947, and but 42.5 miles had been furnished by December 17, 1947 (R. 899). The balance was not completed until March 4, 1948 (R. 901).

Thus during the late summer and autumn seasons, excellent periods of the year for pipe line construction, Oklahoma was delayed and stopped from work for much of the time because Magnolia did not furnish pipe to Oklahoma as needed for construction. The failure of Magnolia was not because the pipe supplier had failed to make deliveries of pipe to Magnolia, certainly not in its entirety. The failure of Magnolia to make substantial deliveries of pipe to Oklahoma as needed for installation in Sections 4, 5 and 6 of the pipe line was due, as we have repeatedly stated, too repeatedly, perhaps, to the fact that Magnolia furnished pipe to Sections 2 and 3 of the pipe line largely in excess of the current, or reasonable future, needs of the two contractors thereon and had made some sort of deal whereby the 40 miles of pipe delivered by the Youngstown Sheet and Tube Company in August and September 1947, to Magnolia was redelivered to the Humble Pipe Line Company.

A jury could have concluded that such action on the part of Magnolia greatly delayed Oklahoma, forced it to perform a large part of its work in the worst seasons of the year (winter of 1947-1948 and spring of 1948); that a considerable part, if not all, of such delay and excess costs was due to the action of Magnolia; and that Oklahoma was entitled to judgment for a considerable part, if not all, of the excess costs sustained by it.[4]

(a)

THERE WAS NO ALLOCATION BY THE CONTRACTS BETWEEN THE PARTIES OF THE PIPE DELIVERED BY THE PIPE SUPPLIERS TO ANY PARTICULAR SECTION OF THE PIPE LINE. MAGNOLIA HAD THE POWER, DUTY AND RESPONSIBILITY OF EQUITABLY DISTRIBUTING THE PIPE DELIVERED BY ITS PIPE SUPPLIERS AMONG THE SEVERAL SECTIONS OF THE PIPE LINE AS NEEDED BY THE RESPECTIVE CONTRACTORS.

Mr. Latimer, President of Magnolia, testified at pages 318 and 319 of the record on this point as follows:

> "Q. • • • Was there any kind of a signed instrument, a contract, or letter or anything else, stating that when pipe comes in, according to any kind of a delivery schedule, "We will deliver this pipe to a particular section and that pipe belongs to that particular section exclusively, and no other section. Is there anything like that in there (Referring to the contract)?
>
> "A. No, sir.
>
> "Q. Is there anything in the contract that says when that pipe comes from the mills and is delivered from the supplier to Magnolia at the railheads that

[4] See petition, page 3, footnote, for agreement made at time Oklahoma reduced bid prices and agreed to take contracts for Sections 4, 5, and 6 of the pipe line. This agreement by Magnolia was breached.

Magnolia will assign it to a contractor and that pipe becomes in the exclusive possession of that contractor until he uses it; is there anything like that?

"A. I don't recall it being in the contract."

Mr. True, Vice President & General Manager of Magnolia, testified on the point as follows:

"A. This schedule indicates overall the tentative promise from these jobbers as to when they would ship this pipe. We indicated as to which section it would be shipped to, according to the way it arrived; in other words, so many miles to Section 1, next number of miles to Section 2, next number 3, and then 4 and on down the line.

"Q. And it was strictly an arrangement between Magnolia and the pipe suppliers?

"A. Right." (R. 258).

"Q. Mr. True, is there ever a time on that pipe line from the time the first carload of pipe gets to the railhead, that you haven't full and complete control over the pipe?

"A. The pipe stays in ownership—it is still with Magnolia.

"Q. It is still your pipe and it is at all times while it is on the pipe line?

"A. Yes, sir.

"Q. And if you want to pick up some pipe and move that pipe from one section to the other, that comes under your business, doesn't it?

"A. It is a matter for you to determine, whether it can be done or not." (R. 264)

We have quoted in the petition (pp. 5-6) the applicable terms of the specifications as to the Schedule of Deliveries by the pipe suppliers to Magnolia and this is referred to in said specifications as the "present" schedule of deliveries. The contract obligation in paragraph 4 of the contracts was on Magnolia to furnish the pipe as "needed" by the contractors and this obligation must be read in connection with the further terms of the contracts fixing the time for the completion by the contractors of each section of the pipe line. The Court will

note that the contract requirement for each section was that it be completed within 150 calendar days from commencement of work. (Petition, p. 5).

We find nothing whatever in the contracts which contradicts the above testimony of President Latimer of Magnolia or the testimony of Mr. True, its vice president and general manager.

The reasonable and proper construction of the contract documents is that if a mistake was made by Magnolia in furnishing pipe to any section of the pipe line, greatly in excess of any current or immediate need of the contractor for some weeks or months in advance and a need developed on the part of a contractor on some other section of the line which was not met from any current deliveries by the pipe suppliers to Magnolia, then it was the duty of Magnolia to take some pipe from the contractor who had an excess amount of pipe and furnish it to the contractor who had need of more pipe in order to continue operations.

It is not understood how the Courts below could have concluded that once the pipe was furnished by Magnolia to one or more sections of the same pipe line, largely in excess of any present or reasonably immediate future need of the contractor, nevertheless that pipe had to remain on the section or sections to which furnished and that a contractor for another section of the same line, to whom pipe was furnished in insufficient quantities or not at all, had to stop work for lack of pipe. Yet that is what the lower courts did do on the insistence of Magnolia's counsel.

(b)

THERE WAS NO "FLAGRANT AND TYPICAL MISREPRESENTATION ON PAGE 2 OF THE PETITION" AS STATED BY COUNSEL FOR MAGNOLIA.[5]

Some of the evidence is in the record, at the pages cited by Magnolia's counsel. The Court is invited to read the same. It is in the most general terms. The "corrected" agreements, or orders, for the pipe, addressed to two pipe suppliers, are also in the record (R. 923-928). They provided that shipping instructions would be given later. The shipping instructions, in summarized form, a great many in number, are also in the record (R. 929-971). The Court will read this testimony in vain if there is any undertaking to determine any reference to any specific shipping instruction, or order for shipment. By supplying the date of the order, the date shipment was required, etc., one might conclude that a small part of the testimony has to do with delay of the National Tube Company in making shipment of 18 miles of pipe to Section 4 of the pipe line and there is scant reference to a possible shipping order for pipe to Section 5 of the line. (R. 323). This was the testimony of a manager of sales whose office was in Dallas, Texas, concerning events in the plant of the National Tube Company in Pittsburgh, Pa. by which he was employed. This was obviously hearsay testimony and the court struck out some of his testimony for that reason (R. 332).

On the other hand, it was admitted that Youngstown Sheet & Tube Company not only made its deliveries on time but actually made some of them ahead of schedule. (R. 236). Why one of the two tube companies, in the same general section of the country, could, and did comply with

[5] See post (p. 7) for our objection to such statements.

its contract in making deliveries on schedule, while the other one is alleged to have failed to do so was not even mentioned by Magnolia's witnesses, so far as we know. In view of the character of the testimony on this point by the witnesses cited in Magnolia's brief, a jury might well have found that Magnolia did not place its shipping orders with the National Tube Company in time for that company to have made the shipments at earlier dates. Most certainly the jury could have found the refusal was arbitrary and capricious of Magnolia in not transferring and furnishing to Oklahoma the pipe Magnolia had previously furnished to the contractors on Sections 2 and 3 of the pipe line largely in excess of the current, or reasonably immediate future, needs of these two contractors.

But the trial court refused to permit a jury to try the case. The findings of fact of the trial court were arbitrary, capricious, and contrary to the evidence in not finding that at least some part of the long delay and stoppages of work by Oklahoma resulted because Magnolia did not furnish pipe to Oklahoma when needed from the several shipments of pipe which Magnolia received and which it had furnished on Sections 2 and 3 largely in excess of the needs of the contractors on said sections.

III

The Contract Cases Cited By Counsel for Magnolia at Pages 10 to 12 of Their Brief Are Not in Point.

In the first place, these cases arose under contracts with the United States Government, tried in the United States Court of Claims, and no jury may be had in the trial of such cases. Here the Sixth Amendment guarantees a trial by jury in a Federal district court in litigation between two private parties where the amount involved exceeds $20.00—which is certainly the situation in

this matter. Also, due process of law, as provided in the Fifth Amendment, requires such a jury when demanded by either party to the litigation.

In the second place, there is no similarity between the facts and contract exculpatory provisions involved in this case and the facts and contract provisions in the *Wells Brothers, Crook Company, Wood, Rice,* and *Foley cases* cited by Magnolia's counsel. These citations by Magnolia's counsel are to the opinions and judgments rendered by this Court, the Court is entirely familiar therewith, and the time of the Court will not be wasted by Oklahoma's counsel on any detailed analysis of such cases for the purpose of showing that they have no application whatever to this petition.

We do not dispute the present right and capacity of either the Federal government and its contractors, or the right and capacity of Magnolia and Oklahoma to stipulate in their respective contracts that either party may not be responsible in damages for any delays or stoppages of work caused the other party. *We simply say, as previously stated in the petition and elsewhere herein, that Paragraph 4 of the contracts and the corresponding terms of the specifications in this case made only a conditional exculpation of Magnolia from damages for delays or work stoppages that Magnolia might cause Oklahoma to encounter and that such conditions precedent were not met by Magnolia.*

The facts being disputed as to the causes of the delays and work stoppages, the issue was one for a jury to determine.

If the quotation on page 12 of Magnolia's brief from the *Wells Bros.* case was ever true, as between the Federal Government and its contractors, it is even more so as to *both Magnolia and Oklahoma* in this case. These parties were most careful as to the language used in Paragraph 4, the exculpatory provisions, of these three

contracts in suit. *Magnolia was not relieved of damages for any or all delays and work stoppages it might cause Oklahoma* but only:

> "* * * FOR DELAY OR WORK STOPPAGE DUE TO FAILURES OF PIPE SUPPLIER TO DELIVER PIPE TO COMPANY ACCORDING TO THE PRESENT SCHEDULE OF DELIVERY OR IF COMPANY IS UNABLE TO FURNISH THE MATERIALS AS NEEDED FOR ANY OTHER REASON BEYOND ITS CONTROL. (P. 4 of petition).

Magnolia's own evidence shows the respective dates of furnishing by it of pipe to each of the five sections of the pipe line, from Section 2 to Section 6, inclusive, and the rates of progress of the contractors on the respective sections of the line. (R. 887-904). It simply can not be disputed therefrom that very early after the contracts were entered into, large quantities of pipe was furnished on Sections 2 and 3 of the pipe line, sufficient to complete the same, and greatly in excess of any need of the contractors on such sections, from day to day, week to week, or month to month. Correspondingly, this evidence also shows the long delays in furnishing pipe to meet the needs of Oklahoma on Sections 4 to 6 of the pipe line. This evidence makes no showing whatever with respect to the 40 miles of pipe which Magnolia redelivered to Humble Pipe Line Company because Magnolia did not furnish the record of this transaction, and Oklahoma had no knowledge thereof at the time of the trial.

A jury might well have found from such evidence and other evidence in the record that Magnolia was not prevented from furnishing pipe as needed by Oklahoma because of any failure of the pipe suppliers to deliver pipe to Magnolia, at least as to some part or all of the periods of delay and work stoppages. Had the jury so found, of course as to such period or periods Magnolia could have obtained no relief under the said paragraph 4 of the contract and the specifications.

CONCLUSION

Counsel for Oklahoma insist that Magnolia's counsel have shown no substantial reasons why the petition should not be allowed or why there would not be well served thereby the due and proper administration of justice in the Federal courts as well as other public interests.

Respectfully submitted,

O. R. McGuire
William S. Campbell.